SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1111

ALFORD KORN, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Rufus W. Peckham, Jr.
Carl L. Shipley
1204 National Press Building
Washington, D. C. 20004
Attorneys for Petitioner

Of Counsel:

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D. C. 20004

INDEX

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTE INVOLVED 2
CONSTITUTIONAL PROVISION INVOLVED 3
STATEMENT 3
REASONS FOR GRANTING WRIT 4
APPENDIX A-1

CITATIONS

CASES:

Crowder v. Terhorst, 107 Ind. App. 288, 21 N.E. 141 4
Gersten v. United States, 176 Ct. Cl. 364 F.2d 850 (1966) 4
McAllister v. Magnolia Petroleum Co., 357 U.S. 211, 78 S. Ct. 1201 5
Peterson v. Hewitt, 195 U.S. 309, 25 S. Ct. 35 4
Richards v. Maryland Ins. Co., 8 Cranch 84 (1814) 5

MISCELLANEOUS:

Constitution of the United States:
Article I, Section 1 . . . . . 3, 5
Amendment 5 3
Title 28, U.S. Code:
Sec. 1491 . . . . . 4, 5
Sec. 2501 . . . . . 2, 4

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Carl L. Shipley and Rufus W. Peckham, Jr., attorneys for Alfred Korn, Jr., petitioner herein, respectfully request on his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled cause.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Claims is No. 413-65, decided October 10, 1966, and is set out *infra*, in the appendix at page A-1.

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28 U.S. Code, Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 are:

The opinion of the Court below decides an important question of federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner's constitutional right to due process of law violated by the introduction of the equitable doctrine of laches by the court below in a lawsuit asserting a claim under an Act of Congress?

2. Was it a deprivation of due process for the court below to apply the doctrine of laches to the petitioner's cause rather than to adhere to the six-year statute of limitations governing claims over which the Court of Claims has jurisdiction.

3. Was it an unconstitutional exercise of legislative power by the Court of Claims to deprive petitioner of his right under the Tucker Act to assert a claim within six years, by imposing the doctrine of laches as a basis for shortening the six year limitations period established by Congress.

STATUTE INVOLVED

Section 2501 (Time for filing suit - Court of Claims Procedure) of Title 28 United States Code, provides in pertinent part:

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, Sec. 1

> "All legislative power shall be vested in a Congress. . . ."

Amendment 5

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . .".

STATEMENT

Plaintiff, a veterans' preference eligible, was employed as a criminal investigator (Special Agent) with the Internal Revenue Service, in New York City, New York.

On or about October 2, 1959, plaintiff was served with a seven-page notice of proposed adverse action (i.e., dismissal) containing six allegations of misconduct broken down into numerous specifications. On or about November 9, 1959, petitioner replied in writing denying all the aforesaid charges. On or about November 24, 1959, the Internal Revenue Service advised petitioner that the charges (with two minor exceptions) were sustained and he was discharged effective November 27, 1959. Thereafter on or about November 27, 1959, petitioner appealed via the agency appeal procedure to the Director of the Personnel Division of the Agency. That appeal was denied on or about December 29, 1959. Petitioner thereafter appealed this action on or about January 5, 1960 to the Director of Personnel of the U. S. Treasury Department. Finally, on or about February 16, 1960, the Director advised petitioner on his last avenue of administrative appeal that the prior adverse decisions were affirmed.

On November 24, 1965, petitioner filed a petition in the U. S. Court of Claims seeking judgment for his alleged wrongful and illegal removal from the federal civil service and in an order dated October 19, 1966, that court ordered the petition dismissed on the sole ground of laches (*infra*; appendix pp. A-1).

This petition for a writ of certiorari follows therefrom.

REASONS FOR GRANTING THE WRIT

Inasmuch as the Court of Claims relied solely on the grounds of laches, as laid down by that court in *Gersten v. United States*, 176 Ct. Cl. ___, 364 F.2d 850 (1966), in dismissing the action below, this petition addresses itself only to that single issue.

The doctrine of laches is an equitable doctrine with roots deep in antiquity, and is principally a question of inequity of permitting a claim to be enforced (*Crowder v. Terhorst*, 107 Ind. App. 288, 21 N.E. 141, 146). The case at bar, however, arises in the United States Court of Claims, a constitutional law court, not an equity court. The Court of Claims has statutory authority (28 USC 1491, *et seq.*) to return money judgments on claims against the United States. The enabling legislation makes no reference whatever to any grant of equitable jursidiction, hence it can be reasonably inferred that the Court of Claims is exclusively a law court. In support of this position is the specific statutory language (28 USC 2501) providing for a six year statute of limitations.

This Court has previously spoken on the question of laches versus statutory limitations,

> "In actions at law, the question of the necessary diligence in bringing suit is determined by the words of the statute, while in suits in equity the question is determined by the circumstances of each particular case." (*Peterson v. Hewitt*, 195 U.S. 309, 25 S. Ct. 35.)

Petitioner submits that for the court to substitute its equitable conception of laches for the express statutory six year period of limitations is usurpation of powers not authorized by the Congress and amounts to judicial legislation, i.e., replacing the unequivocally expressed will of the legislature by the will of the court. Petitioner, therefore, submits that shortening the six year statutory provision by the application of laches is a denial of due process as contemplated by the Federal Constitution.

Moreover, it is a legislative act by the court below, in effect amending 28 USC 2501 to shorten the six year statute of limitations, and is thus a violation of Art. I, Sec. 1 of the Constitution which places all legislative power in Congress, not the courts.

If, however, this Court should decide that the doctrine of laches has applicability to this case, it is urged to adopt as law the separate opinion of Mr. Justice Brennan in *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 211, 78 S. Ct. 1201:

> "Equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law."

Over 150 years ago this Court, speaking through Mr. Justice Johnson, laid down the principle that,

> "Exceptions to the operation of the statute of limitations are not favored." *Richards v. Maryland Ins. Co.*, 8 Cranch 84, (1814).

Petitioner urges that that principle is as valid today as when first pronounced and that the case at bar should not be excepted from the provisions of 28 USC 2501.

WHEREFORE, the premises considered, petitioner submits that there are special and important reasons justifying grant of a writ of certiorari in this case.

Respectfully submitted,

Rufus W. Peckham, Jr.
Carl L. Shipley
1204 National Press Building
Washington, D. C. 20004
Attorneys for Petitioner

OF COUNSEL:

Shipley, Akerman & Pickett
1204 National Press Building
Washington, D. C. 20004

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 413-65

ALFRED KORN, JR.

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS and COLLINS, Judges.

ORDER

This case comes before the court on defendant's motion and plaintiff's cross-motion for summary judgment. Upon consideration thereof, together with the opposition thereto, and without oral argument, on the basis of the decision by this court in *Gersten v. United States*, No. 104-60, decided July 15, 1966, 176 Ct. Cl. ___, it is concluded that plaintiff's claim is barred by laches and,

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted, plaintiff's cross-motion for summary judgment is denied and plaintiff's petition is dismissed.

BY THE COURT

OCT 10 1966

Wilson Cowen
Chief Judge

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No. 1111

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a veterans' preference eligible, was employed by the Internal Revenue Service as a criminal investigator. On November 27, 1959, he was removed from his position on charges of inefficiency and improper conduct. Petitioner appealed his removal through the appellate procedures provided by his agency,[1] and his appeal was denied by the Director of the Personnel Division of the Service on December 29,

[1] Petitioner, as a veterans' preference eligible, could have appealed his removal through the Civil Service Commission, but he elected to appeal through his agency.

1959, and by the Director of Personnel of the Department of the Treasury on February 16, 1960. The latter decision was the final administrative decision on petitioner's removal.

On November 24, 1965, five years and nine months after petitioner had exhausted his administrative remedies, he instituted this action in the Court of Claims seeking to recover back pay for his allegedly wrongful removal. The Court of Claims granted the government's motion for summary judgment. It held that petitioner's claim was barred by laches, relying on its decision in *Gersten* v. *United States*, 364 F. 2d 850.

The application of the doctrine of laches to this type of litigation is well settled. Indeed, laches has been held to bar recovery of back pay from the United States in cases involving substantially shorter periods of delay. See *e.g.*, *United States ex rel. Arant* v. *Lane*, 249 U.S. 367 (22 months); *Norris* v. *United States*, 257 U.S. 77 (11 months); *Nicholas* v. *United States*, 257 U.S. 71 (three years); *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A.D.C.) certiorari denied, 361 U.S. 841 (33 months). In this connection, it should be noted that neither in this Court nor in the court below did petitioner assign any reason for failing to bring suit more expeditiously.

We respectfully submit that the petition should be denied.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1967

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